

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Michael Lloyd	: CIVIL ACTION
	: No. 96-cv-3876
	:
v.	:
	:
United States of America	: CRIMINAL ACTION
	:
	: No. 91-600-1

MEMORANDUM AND ORDER

Norma L. Shapiro J.

July ,1997

Presently before this court is a pro se petition filed by Michael W. Lloyd, for relief from judgment pursuant to 28 U.S.C. §2255. The petition was referred to Magistrate Judge M. Faith Angell for a report and recommendation. Her report, filed May 8, 1997, recommended that Petitioner's claim of double jeopardy be denied. After careful and independent consideration of the Petition, the Report and Recommendation and Objections of the Petitioner, the Report and Recommendation will be approved and Mr. Lloyd's §2255 Motion will be denied.

BACKGROUND

Mr. Lloyd asserts his right not to be placed in double jeopardy<sup>1</sup> was violated by his conviction for mail, wire and bank fraud and conversion of union benefit and pension plan funds following the seizure of his assets in various actions by the Securities Exchange Commission ("SEC").

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1. The Double Jeopardy Clause reads, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life and limb. . ." U.S. Const., Amend.V.

On June 6, 1990, the Securities and Exchange Commission filed a civil complaint charging Lloyd with violations of federal securities law in connection with Lloyd's fraudulent operation of his securities brokerage firm. SEC v. Lloyd, Civ. No. 90-3841 (E.D.Pa. 1995). A preliminary injunction froze many of Lloyd's assets. In December, 1990 the Securities Investor Protection Corporation ("SIPC"), filed an application to convert the SEC receivership to a liquidation under the Securities Investors Protection Act ("SIPA").<sup>2</sup> For a summary of Lloyd's civil and bankruptcy actions, see In Re: Lloyd Securities Inc., 75 F.3d 853 (3rd Cir. 1996), affirming In Re: Lloyd Securities, Inc., 183 B.R. 386, 389 (E.D.Pa. 1995); see also, In Re: Lloyd Securities, Inc., 163 B.R. 242, 245 (E.D.Pa. 1994). Settlements, negotiations and sales of assets nominally owned by Lloyd and Lloyd entities followed.<sup>3</sup>

On October 30, 1991, a Criminal Information was filed against Lloyd for 2 counts of mail fraud, 1 count of wire fraud, 2 counts of bank fraud, 1 count of conversion of union benefit

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2. SIPA, 15 U.S.C. §§78 aaa et seq, was enacted to redress the consequences of securities brokerage failures. SIPC a non-profit, private corporation to which all brokerage dealers belong, maintains a fund to provide relief to customers of failing brokerages. SIPA provides a liquidation process; a SIPC Trustee removes the matter to Bankruptcy Court for liquidation. SIPC is subrogated to customers claims paid by the trustee.

3. These activities were related to Lloyd's securities violations.

and pension plan funds and 1 count of aiding and abetting.<sup>4</sup> Lloyd entered a guilty plea on all counts. He appealed his sentence for misapplication of the Federal Sentencing Guidelines, not double jeopardy issues. The sentence was affirmed in part and dismissed in part; the action was remanded by consent for resentencing.<sup>5</sup> United States v. Lloyd, 989 F.2d 489 (3rd Cir. 1993). Lloyd again appealed his sentence under the Guidelines, without asserting double jeopardy, and the sentence was affirmed. See, United States v. Lloyd, 22 F.3d 304 (3rd Cir 1994). Lloyd was sentenced to a sixty-three (63) month sentence and ordered to pay restitution of \$4,626,601.<sup>6</sup>

#### **DISCUSSION**

Pursuant to Rule 8(b)(3) of the Rules Governing §2255 Proceedings, a petitioner must serve and file written objections to the Magistrate Judge's Report and Recommendation within ten days of service.<sup>7</sup> The District Judge must then make a de novo determination of those portions of the Report and Recommendation to which objections were made and may accept, reject or modify

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4. The two bank fraud and one of the mail fraud charges were not related to the securities violations.

5. Collateral for some of Lloyd's fraudulent bank loans lessened the loss and lowered the Federal Sentencing Guidelines. United States v. Lloyd, 989 F.2d 489 (3rd Cir. 1993).

6. Information in this section was taken from Petitioner's habeas petition, the Government's reply, Magistrate Judge Angell's Report and Recommendation and Petitioner's objections.

7. 28 U.S.C.A. foll. §2255 (1997).

the recommendation of the Magistrate Judge.<sup>8</sup> Petitioner did not file his objections until June 6, 1997, almost a month after Magistrate Judge Angell filed her Report and Recommendation, three weeks after the filing deadline. Petitioner's objections are procedurally barred from consideration because they were untimely filed.

However, there is no merit to the objections even if they were timely filed. Magistrate Judge Angell recommended that the petition for relief from judgment be denied because the court lacked subject matter jurisdiction to hear the petition. Issues not raised at sentencing or on direct appeal cannot be litigated under 28 U.S.C. § 2255, absent a showing of a cause and prejudice from the errors at issue. United States v. Frady, 456 U.S. 152, 167-69 (1982); see United States v. Essiq, 10 F.3d 968, 979 (3d Cir. 1993).

Petitioner's argues that the court does have jurisdiction over his claim, but petitioner had ample opportunity to address a double jeopardy violation. He failed to preserve this issue in his prior motions and proceedings; he states no reason or cause for his failure to do so. Petitioner's procedural default, the untimely assertion of his double jeopardy claim, precludes him from asserting it in a 28 U.S.C. § 2255 motion. The motion is improperly before this court; for lack of subject matter jurisdiction.

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8. 28 U.S.C.A. foll. §2255. Rule 8(b)(4)(1997).

Magistrate Judge Angell's Report and Recommendation also states there is no evidence of double jeopardy to support Lloyd's claim for relief under 28 U.S.C. § 2255. The Report and Recommendation correctly states that the charges against Lloyd are not the "same offense" so that there was no double jeopardy.<sup>9</sup>

In the present action, the Petitioner was first charged with civil violations of securities law: 15 U.S.C. §§77e(a), (c), 77q(a), 78j(b), and 78(o)(c)(3). These civil violations required proof of elements of net capital requirements, existence of a "security" and a lack of registration. Petitioner was criminally convicted of violations of 18 U.S.C. §§ 664, 1341, 1343 and 1344. These crimes required proof of material mailing or material interstate wire communication, an FDIC insured financial institution, and conversion of union or pension funds. The elements of the actions are not the same and do not meet the prerequisites for a double jeopardy violation.

Lloyd was not punished twice for the same offense.<sup>10</sup> In the SEC actions, Lloyd's property was seized to repay over \$4,000,000 in customers funds because Lloyd illegally sold unregistered securities and lost customer funds. An SEC

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9. Blockburger v. United States, 284 U.S. 299 (1932)(double jeopardy only attaches to a defendant when she is twice charged with the same offense or different offenses which require proof of the same elements).

10. Witte v. United States, \_\_\_ U.S. \_\_\_, 115 S.Ct. 2199 (1995)(government is prohibited from punishing twice or attempting a second time to punish criminally for the same offense).

equitable action, seeking disgorgement and resulting in an asset freeze, does not constitute punishment; such a proceeding serves a variety of purposes but is designed primarily to seize property used in violation of the law and to require disgorgement of the fruits of illegal conduct. See United States v. Ursery, \_\_U.S.\_\_, 116 S.Ct. 2135, 2151 (1996)(in rem civil forfeitures are neither punishment nor criminal for purposes of double jeopardy.)

The Supreme Court has consistently held that double jeopardy does not apply to civil forfeitures. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)(double jeopardy clause is not applicable unless the forfeiture sanction was intended as punishment so that the proceeding was essentially criminal in character); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); Conoco Inc. v. Skinner, 970 F.2d 1206 (3rd Cir. 1992)

Petitioner objects to the characterization of the SEC civil action as a forfeiture. Petitioner asserts that the seizure in his civil case was a criminal penalty. Like civil forfeiture, the SEC civil litigation is only intended to provide restitution to victims of securities fraud. See United States v. Halper, 490 U.S. 435 (1989). Just as forfeiture is usually remedial in nature, an SEC equity action, seeking disgorgement of fraud proceeds and resulting in an asset freeze, attempts to make defrauded customers whole; it also does not constitute punishment. The more detailed factual and legal analysis of the

Magistrate Judge is correct in all respects. There is no double jeopardy violation.

For the reasons stated above, Petitioner's motion under 28 U.S.C. §2255 will be denied. An appropriate order follows.